Attention is drawn to the order prohibiting publication of certain information

IN THE EMPLOYMENT RELATIONS AUTHORITY
CHRISTCHURCH

[2012] NZERA Christchurch 95
5363997

	BETWEEN	MICHAEL DENNEHY Applicant
	A N D	KERSHEVIN FARMS LIMITED Respondent

Member of Authority:	David Appleton
Representatives:	Applicant in Person Judith Jones, Advocate for Respondent
Investigation meeting:	27 April 2012 at Hokitika
Submissions Received	Orally on the day of the investigation meeting and 4, 15 and 16 May 2012
Date of Determination:	21 May 2012

DETERMINATION OF THE AUTHORITY

A. The Applicant was not entitled to a greater notice period than one calendar month.

B. The Applicant's dismissal was by reason of redundancy.

C. The Applicant's dismissal was unjustified by reason of a failure to consult with him before the decision was made.

D. Costs are reserved.

Prohibition from publication

[1] I order prohibition from publication of financial details of the sale of the respondent's farm, which were contained in a document that was produced to the Authority during the investigation meeting.

Employment relationship problem

[2] Mr Dennehy claims that he was unjustifiably dismissed from his employment as joint farm manager on 1 December 2011 when a director of the respondent, Ms Jones, gave him one month's notice of termination due to the sale of the farm. Mr Dennehy asserts that he should have been allowed to stay on the dairy farm until the end of the season (31 May, which would have been effective notice of seven months). Mr Dennehy's partner, who was employed jointly by the respondent, did not launch proceedings in the Authority.

[3] The respondent's position is that the respondent had entered into a lease-to-buy arrangement with a third party who had wanted to occupy the farm and start working it at the beginning of December 2011. Mr Dennehy disputed that this had been a genuine arrangement and contends that he was dismissed because the respondent had been unhappy with the performance of his partner and him in managing the farm, and that the respondent had wished to avoid following a fair performance improvement process.

[4] The respondent asserted that Mr Dennehy's partner, Maree, had been employed as farm manager, not Mr Dennehy, but did not deny that he had been employed by the respondent. No employment agreement had been issued to Mr Dennehy and the parties' evidence was that no specific terms had been agreed as to what would be an appropriate period of notice of termination. The terms of the employment that had been agreed were that Mr Dennehy and his partner would receive a joint income of $65,000 per annum, together with free accommodation and power bills paid.

[5] It was common ground between the parties that the farm had been for sale when Mr Dennehy and his partner had started working there in July 2009 and that it had remained for sale throughout their employment. At one point, a possibility had arisen for Mr Dennehy and his partner to buy the farm, although this had fallen through.

[6] Mr Dennehy's evidence was that, typically when a dairy farm was sold, it would change hands at the end of the season (31 May) and that the farm manager would be allowed to remain employed until that date. Ms Jones' evidence on behalf of the respondent was that that may have been the position in the past, but that nowadays dairy farms sold at any time in the season and it was perfectly reasonable to have given the farm manager one month's notice.

[7] Ms Jones' evidence was that the lease-to-buy arrangement had been genuine but had not been recorded in writing because the third party had quickly decided to buy the farm outright, very shortly after having made the lease-to-buy arrangement with the respondent. The Authority was shown a sale and purchase agreement which showed that the sale became unconditional on 1 June 2012. The sale and purchase agreement was dated March 2012, which Ms Jones accounted for by saying that her husband had taken two months to sign it.

Issues

[8] The issues that the Authority has to determine are:

(a) Was the dismissal of Mr Dennehy for the reason given by the respondent or was that reason a sham;

(b) If the reason given by the respondent had been genuine, what was the appropriate notice of termination that should have been given to Mr Dennehy;

(c) If the reason given by the respondent had been genuine, had the dismissal been carried out in a fair and reasonable way?

Findings

Was the dismissal of Mr Dennehy for the reason given by the respondent or was that reason a sham?

[9] As well as evidence from Ms Jones, the Authority also heard evidence from Mr Dave Nolan, the real estate agent who handled the sale of the farm on behalf of the respondent. Mr Nolan confirmed that the arrangement was as described by Ms Jones. He said that the reason for the lease-to-buy arrangement being changed so quickly was that the third party purchasers had originally needed to await the sale of a

property in Akaroa before they could commit to buying the farm, but that a relative had agreed to advance the money to the third party prior to the sale of the Akaroa property. The Authority was shown a copy of a sale and purchase agreement, which was undated, but which showed that there was, as a condition of the purchase of the farm, the sale of a property in Akaroa.

[10] Whilst Mr Dennehy's suspicions of the validity of the lease-to-buy arrangement were based on speculation, the evidence of the respondent was at least partially supported by written documentation in the form of the original sale and purchase agreement produced by Mr Nolan. On the balance of probabilities, I therefore believe that the evidence of the respondent is truthful and that a lease-to-buy arrangement had been orally agreed between the respondent and a third party in mid-October 2011 in accordance with the evidence that Ms Jones gave.

[11] The Authority is not permitted to substitute their commercial judgement for that of the respondent, even when the commercial decision of the respondent may adversely impact upon its employees. *GN Hale & Son Ltd v Wellington etc Caretakers etc IUOW* [1991] 1 NZLR 151, (1990) ERNZ Sel Cas 843 (CA); *New Zealand Building Trades Union v Hawke's Bay Area Health Board* [1992] 2 ERNZ 897 (EmpC); *New Zealand Nurses Union v Air New Zealand Ltd* [1992] 3 ERNZ 548 (EmpC).

[12] Therefore, I find that the reason given for the termination of Mr Dennehy's employment was genuine and that his employment was therefore terminated by reason of redundancy, and not poor performance as asserted by Mr Dennehy.

What period of notice of termination should have been given to Mr Dennehy?

[13] The next question to consider is whether the appropriate notice to be given to Mr Dennehy was one month, seven months, or some other period. In the absence of an express contractual term as to the appropriate period of notice for an employer to give an employee in respect of the termination of the employment relationship, reasonable notice may be implied into the employment relationship.

[14] All of the negotiations between the parties at the start of the relationship had been between Ms Jones and Mr Dennehy's partner, Maree. Mr Dennehy's partner did not turn up to give evidence at the investigation meeting. Ms Jones' evidence was that there had been no specific discussion about what would happen in the event of a

sale of the farm, although she assumed that it was obvious that one month's notice would be given as that was usual practice, and also because one month's notice is what is provided in the employment agreement they had used in the past. Mr Dennehy's position was that he had assumed that any sale would result in them working until the end of the season.

[15] In the absence of express agreement on this point, it is necessary to consider what reasonable notice should be given in such circumstances. (*Ogilvy & Mather (NZ) Ltd v. Turner* [1995] 2 ERNZ 398; [1996] 1 NZLR 641 CA.) What constitutes reasonable notice depends on the facts of each case. In *Kitchen Pak Distribution Ltd v. Stoks* [1993] 2 ERNZ 401, the Court referred to the purpose of reasonable notice being to give employees a fair opportunity to seek other employment and adjust to the changed circumstances. In *Charta Packaging Ltd v Howard* [2002] 1 ERNZ 10, a redundancy case, it was held that it was relevant to consider whether employees needed longer than usual to retrain or seek other employment in light of the company's financial circumstances.

[16] In this case, one factor that is particularly relevant to consider is that Mr Dennehy's accommodation was linked to his employment. When Ms Jones gave Mr Dennehy and his partner notice of dismissal, he and his partner not only had to look for new employment but also new accommodation. As it happens, he did find accommodation in a neighbouring farm which also provided Mr Dennehy with some part time work.

[17] Other factors that have been held to be relevant in the case law when determining what reasonable notice should be include the employee's length of service, his *seniority* (in terms of the importance of the job) and the frequency of his pay.

[18] I do not accept Mr Dennehy's contention that notice should have been until the end of the dairy season. There is no evidence that the arrangement entered into between him and the respondent at the start of his employment was a fixed term one running until the end of the 2011/2012 season, or that the parties intended that the arrangement could not be terminated earlier than the end of the season.

[19] When deciding what would be reasonable notice, I am mindful of the following. The Residential Tenancies Act 1986, at section 53, provides that the notice

that should be given to terminate a service tenancy is no less than 14 days when notice to terminate a contract of service has been given, half the period of time that had been given to Mr Dennehy. In addition, Mr Dennehy's length of service was not particularly long, being around 18 months. His position, which he described as joint manager, was reasonably significant in running the farm, although he did share the responsibility with his partner. He was paid fortnightly.

[20] Taking all these factors into account, I believe that one months' notice was reasonable notice to have given Mr Dennehy. Although it would probably have been a stressful time for Mr Dennehy and his partner to find both new employment and new accommodation, the Residential Tenancies Act clearly envisages that 14 days notice of termination of the service tenancy is sufficient in such circumstances, and so the fact that accommodation was linked to his employment does not persuade me to extend the notice required to be given to terminate the employment. In addition, one month's notice is what is typically agreed nowadays in most types of employment at the level at which Mr Dennehy was employed.

Had the dismissal been carried out in a fair and reasonable way?

[21] The final issue to consider is whether the termination of Mr Dennehy's employment was fair and reasonable from a procedural point of view.

[22] Section 103A of the Employment Relations Act 2000 states as follows:

> *(1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).*
> *(2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.*
> *(3) In applying the test in subsection (2), the Authority or the court must consider—*
>
> > *(a) whether, having regard to the resources available to the employer, the employer sufficiently investigated the allegations against the employee before dismissing or taking action against the employee; and*
> > *(b) whether the employer raised the concerns that the employer had with the employee before dismissing or taking action against the employee; and*
> > *(c) whether the employer gave the employee a reasonable opportunity to respond to the employer's concerns before dismissing or taking action against the employee; and*
> > *(d) whether the employer genuinely considered the employee's explanation (if any) in relation to the allegations against the employee before dismissing or taking action against the employee.*

(4) In addition to the factors described in subsection (3), the Authority or the court may consider any other factors it thinks appropriate.
(5) The Authority or the court must not determine a dismissal or an action to be unjustifiable under this section solely because of defects in the process followed by the employer if the defects were—
(a) minor; and
(b) did not result in the employee being treated unfairly.

[23] Section 4 (1A) of the Act states as follows:

The duty of good faith in subsection (1)—
(a) is wider in scope than the implied mutual obligations of trust and confidence; and
(b) requires the parties to an employment relationship to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, among other things, responsive and communicative; and
(c) without limiting paragraph (b), requires an employer who is proposing to make a decision that will, or is likely to, have an adverse effect on the continuation of employment of 1 or more of his or her employees to provide to the employees affected—
(i) access to information, relevant to the continuation of the employees' employment, about the decision; and
(ii) an opportunity to comment on the information to their employer before the decision is made.

[24] Ms Jones admitted that she had not spoken to Mr Dennehy, or his partner, about the decision to lease the farm on a lease-to-buy arrangement, or to sell it, prior to reaching an agreement with the third party. Whilst Ms Jones' evidence was that Mr Dennehy and his partner had always known that the property was for sale, it was still incumbent upon the respondent to have consulted with Mr Dennehy and his partner about the arrangement she was proposing to make.

[25] Whilst this is a small operation which does not have the resources of a large employer, the basic requirements of consultation still need to be met. As there was no consultation with Mr Dennehy whatsoever prior to the decision to dismiss him, I am bound to find that the dismissal was unjustifiable.

Remedies

[26] Having found that Mr Dennehy's employment was unjustifiably terminated, I must now consider what remedies are due to him.

[27] Section 123 of the Act provides for the provision of remedies following a finding of unjustifiable dismissal. Reinstatement was initially sought on an interim

basis by Mr Dennehy, but he dropped that application in December 2011. Given that the farm has now been sold to a third party, it would not be appropriate to order reinstatement.

[28] Section 123(1)(b) of the Act provides for the reimbursement to the employee of a sum equal to the whole or any part of the wages or other money lost by the employee as a result of the grievance. There are a number of cases which establish that, where an employee's dismissal for redundancy is substantially justified (as opposed to procedurally justified), an applicant is not entitled to an award of lost wages. (For example, *Simpson Farms Ltd v Aberhart* [2006] 1 ERNZ 825 and *McGuire v Rubber Flooring (NZ) Ltd* 2/3/06 Travis J, AC9/06).

[29] I am satisfied that, although fundamentally flawed in terms of the procedure followed, the commercial reason behind the decision to dismiss Mr Dennehy for redundancy was genuine. Under circumstances such as these, where the respondent had been trying to sell the farm for a considerable time, it is highly unlikely that consultation with Mr Dennehy would have made any difference to the respondent's decision to lease it on a lease to buy arrangement, and later to sell it.

[30] In addition, given that there would have been nothing that Mr Dennehy could realistically have said in consultation to have changed the respondent's mind, the consultation would in likelihood have been very short in duration, and would not have prolonged the employment beyond the date it lasted.

[31] Under these circumstances, I do not believe that it is appropriate to award any loss of wages or benefits arising out of the unjustified dismissal because of the fact that, if a fair procedure had been followed, Mr Dennehy's employment would have terminated in any event for redundancy at the time it did.

[32] However, Mr Dennehy is entitled to receive compensation under s.123(1)(c)(i) of the Act for humiliation, loss of dignity, and injury to the feelings. Mr Dennehy did not give much evidence about this, although I am satisfied that not having been consulted about the potential sale of the property, the ending of his employment and the consequential need to move out of his accommodation would have caused him humiliation, embarrassment and injury to his feelings, which proper consultation may have assuaged. Without cogent evidence as to the intensity or nature of those feelings, however, I must restrict myself to a modest award, which I fix at $4,000.

[33] Having assessed the remedies, Section 124 of the Act provides that, where the Authority determines that an employee has a personal grievance, the Authority must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance:

> *(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and*
> *(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.*

[34] I am satisfied that Mr Dennehy did not contribute to his personal grievance in any respect, and so I do not reduce the sums awarded under s 123 (1)(c)(i).

[35] There was evidence to suggest that Mr Dennehy did not make sufficient efforts to mitigate his losses, as he has been doing part time work only since he was dismissed, and was not able to explain why, save in vague terms. However, mitigation is relevant to the reimbursement of lost wages, not to an award of compensation under s 123 (1)(c)(i). As I have found that it is not appropriate to award lost wages in this case, Mr Dennehy's apparent failure to mitigate his losses do not adversely affect the award of compensation.

[36] Although the respondent failed to provide Mr Dennehy with a written employment agreement, Mr Dennehy did not request that a penalty be ordered against the respondent, and so no such order shall be made.

Orders

[37] I order that the respondent pay to Mr Dennehy the sum of $4,000 pursuant to s 123 (1) (c) (i) of the Act.

Costs

[38] Mr Dennehy was unrepresented throughout the proceedings and so is unlikely to have incurred any legal costs. However, if he believes he has incurred legal costs which he would like to recover from the respondent, he should make a submission in writing to the Authority within 28 days of the date of this determination, sending a

copy to the respondent. The respondent will then have a further 28 days within which to respond in writing to any representations made by Mr Dennehy by sending a copy to the Authority and to Mr Dennehy.

David Appleton
Member of the Employment Relations Authority